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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

WENDY NORMA COURTNEY as
Trustee etc.,

Plaintiff and Appellant,

v.

STEPHAN MICHAEL SPERLING,

Defendant and Respondent.

B236599

(Los Angeles County
Super. Ct. No. BP100209)

APPEAL from an order of the Superior Court of Los Angeles County, Michael I. Levanas, Judge. Affirmed.

Law Offices of Michael L. Magasinn and Michael L. Magasinn for Plaintiff and Appellant.

Parker, Milliken, Clark, O'Hara & Samuelian, Terence S. Nunan and Mark Oneal Suttle, for Defendant and Respondent.

I. INTRODUCTION

Wendy Norma Courtney, as trustee of the Samuel J. and Beatrice Sperling Family Trust (the trust), appeals from the probate court's August 24, 2011 judgment on the pleadings order. The order was issued in connection with the petition for instructions regarding enforcement of the no contest clause in favor of a trust beneficiary, Stephan Michael Sperling.¹ The trustee argues she pled sufficient facts in her petition for instructions to establish that Stephan violated the no contest clause. The trustee reasons the claims alleged against her in Stephan's 2006 and first amended petitions are frivolous. We conclude the trial court correctly granted Stephan's judgment on the pleadings motion. Accordingly, the probate court's August 24, 2011 order denying the trustee's petition for instruction regarding enforcement of the no-contest clause is affirmed.

II. PROCEDURAL AND FACTUAL MATTERS

On May 17, 1989, Samuel J. Sperling and Beatrice Sperling established the Samuel J. and Beatrice Sperling Trust, which was amended on September 27, 1989 and October 26, 1999. Following Mrs. Sperling's death on February 26, 1999, three subtrusts were created: the exemption trust; the qualified trust; and the survivor's trust. The exemption and qualified trusts became irrevocable upon Mrs. Sperling's death in 1999. However, Mr. Sperling, the surviving spouse and sole trustee at the time of Mrs. Sperling's death, did not fund the qualified trust. The survivor's trust became irrevocable upon Mr. Sperling's death in April 2006.

Mr. and Mrs. Sperling had two children, the trustee and Stephan. The trustee and Stephan are beneficiaries of the trust with each having a 40 percent share of its assets. The trustee's two children and Stephan's two children each received five percent of the

¹ For purposes of clarity, and not out of any disrespect, we will refer to Stephan Michael Sperling as Stephan.

residue of the trust. The trustee became the co-trustee of the trust with Mr. Sperling on October 26, 1999. She became the sole trustee after Mr. Sperling's death in 2006.

The amendment to the agreement and declaration of trust contains a no-contest clause in paragraph E.2: "No Contest. If any beneficiary under this instrument or any trust hereunder, other than a Settlor or any charitable beneficiary, in any manner directly or indirectly, contests or attacks this instrument or any provision under this instrument, or the Will of a Settlor or any provision under that Will, or conspires to do so, or fails to cooperate in good faith in the defense of any attack or contest, any share or interest in this trust estate given to or for the benefit of such beneficiary under this instrument is revoked and shall be disposed of in the same manner provided herein as if such beneficiary had predeceased the Settlers without issue. The Trustee is specifically authorized to defend, at the expense of the trust estate, any contest or attack of any nature made at any time upon a Settlor's Will or this instrument or any provision thereunder. For the purpose of this paragraph, a request to a court of competent jurisdiction for instructions or interpretation shall not be deemed to be a contest or attack."

The trust instrument gives the trustee the power to "retain property without any obligation of diversification" under paragraph C.4. In addition, paragraph C.5 of the trust instrument allows the trustee, "[T]o continue to hold (at the Trustee's election) all assets without liability for failure to invest the trust estate in properties having greater income, greater appreciation, or less risk or loss of income or principal." Paragraph C.17 of the trust instrument provides a waiver of the trustee's conflict of interest: "No action by a Trustee otherwise appropriate under this instrument shall be deemed improper or invalid because of a position of conflict of interest or fiduciary restrictions arising out of transactions with the Trustee or any entity of which the Trustee is a fiduciary, beneficiary, officer, employee, partner, member or otherwise interested party." Finally, paragraph D.13 of the trust instrument provides for exoneration of a successor trustee: "No successor Trustee shall be responsible for the acts or omissions of any prior Trustee, or have any duty to audit or investigate the accounts or administration of any such Trustee, or, unless requested in writing to do so by a person having a present or future

beneficial interest under any trust, have any duty to take action to obtain redress for breach of trust.”

II. PROCEDURAL HISTORY

A. Stephan’s Removal Petition And Trustee’s First Appeal

On October 26, 2006, Stephan filed an application to determine whether his proposed petition to remove the trustee and to appoint a successor trustee would violate the no contest clause. Stephan’s application was filed under former Probate Code section 21320.² The proposed petition alleges the trustee breached her fiduciary duties by: occupying trust real property without paying rent; investing in speculative internet investments; and failing to fund the qualified trust. On January 29, 2007, the probate court granted Stephan’s application. The probate court ruled: “[A]s to the survivor’s subtrust, Probate Code section 21305 [, subdivision] (b)(7) applies because the subtrust became irrevocable after January 1, 2001; it specifically states that such a petition to remove [a] trustee is not a violation of ‘no contest’ clause. As to the other two subtrusts, a review of the ‘no contest’ clause itself does not make any reference to such a petition being a violation of the ‘no contest’ clause.”

On December 3, 2007, we affirmed the order in an unpublished opinion. We concluded: “[T]he proposed petition alleging the trustee has breached her fiduciary duties is not a contest within the meaning of the trust’s no contest clause; the challenge with respect to the survivor’s trust is also not a contest under the plain language of section 21305, subdivision (b) and (d); we cannot consider the merits of the fiduciary breach petition in ruling on the section 21320 application; and there is no claim the no contest clause, or a provision of it, violates the public policy as a matter of law.” (*Sperling v. Courtney* (Dec. 3, 2007, B196226 [nonpub. opn.] pp. 15-16.) We explained:

² All further statutory references are to the Probate Code unless otherwise indicated.

“The present no contest clause revokes the share of the estate given to or for the benefit of any beneficiary who “in any manner, directly, or indirectly, contests or attacks this instrument or any provision under” the trust. The proposed petition to remove the trustee does not contest or attack the trust instrument or any of its provisions. Success on the proposed petition would not change the Sperlings’ estate plan or disturb any trust terms. . . . The proposed petition addresses the trustee’s conduct. It seeks to remove and replace the trustee for alleged acts in breach of her fiduciary duties – specifically: occupying the trust real property without paying rent; investing in speculative internet investments; and failing to fund the qualified trust. Nothing in the language of the no contest clause prevents Stephan from asserting the trustee has breached her fiduciary duties.” (*Sperling v. Courtney, supra*, at pp. 12-13.)

B. Stephan’s First Amended Petition

On August 17, 2010, Stephan filed a first amended petition for accounting, removal of trustee, appointment of successor trustee and order for reimbursement of trusts. The first amended petition alleges the trustee breached her fiduciary duties by: failing to fund the qualified trust; investing in a non-publicly traded limited liability company the trustee has a personal interest in; and refusing to disclose the terms of her children’s purchase of the trust’s interest in the limited liability company. The first amended petition states \$1.1 million in assets should have gone into the irrevocable qualified trust instead of the revocable survivor’s trust. Because the survivor’s trust was revocable, the principal of the trust could be invaded to make gifts to the trustee and her children. The first amended petition alleges: the trustee received \$300,000 from the trust between 2001 and 2005; the trustee’s son received \$10,00 in 2002; and the trustee’s daughter received \$21,000 from the trust in 2002. The first amended petition also seeks: an accounting of the qualified trust; reimbursement by the trustee for any losses from her breaches of fiduciary duties; and reimbursement by the trustee for the defense costs relating to Stephan’s section 21320 application.

C. Trustee's Petition For Instructions

On November 10, 2010, the trustee filed her petition for instructions regarding enforcement of the no contest clause. The petition for instructions alleges the original removal petition and the first amended petition violate the no contest clause. The trustee asserts the first amended petition violates the no contest clause because the allegations are frivolous. Prior to the filing of the first amended complaint, the trustee informed Stephan that most of the money transferred from two trust accounts were deposited into Mr. Sperling's bank account. Of the \$311,679 that was distributed out of the trust accounts, \$255,000 was deposited into Mr. Sperling's bank account, \$10,000 was received by the trustee as a gift and \$46,679 was paid to the trustee for caregiver services to Mr. Sperling. The trustee acknowledges she and her children received cash gifts from Mr. Sperling; however, Stephan and his children also received cash gifts from Mr. Sperling. As for the sale of the trust's interest in the limited liability corporation, the first amended petition allegations are frivolous. The trustee argues she disclosed all documents relating to the transaction to Stephan and his claim relating to the limited liability corporation is barred by the statute of limitations. In addition, the petition for instructions alleges Stephan's original removal petition is frivolous. The removal petition alleges the trustee breached her fiduciary duties by: occupying trust real property without paying rent; investing in speculative internet investments; and failing to fund the qualified trust. Stephan dropped the first two breach of fiduciary duty claims from his first amended petition which show these claims are frivolous and without legal basis in law or fact.

D. Stephan's Judgment On The Pleadings Motion

On May 26, 2011, Stephan filed a motion for judgment on the pleadings on the trustee's petition for instructions regarding the no contest clause. On June 27, 2011, the probate court issued its tentative ruling on the record: "In this case, the court of appeals

reviewed the original petition and upheld the court's determination that it did not violate the trust's no contest clause because it did not attack the trust or the terms of the trust. The amended petition in this matter before the court is not very different from the original petition, and the princip[le] applied by the appellate court that it does not attack the terms of the trust still applies to the amended petition. It does not attack the terms of the trust. . . . [¶] In any event, the court . . . does review the petition independently and finds that the amended petition does not constitute a contest. . . . In this case, a review of the no contest petition and the amended petition shows that moving party is not challenging the validity of the trust, either in substance or form. [¶] Furthermore, responding party argues that even if the no contest petition may eventually fail, it should not fail on this motion because responding party's alleged facts must be deemed true. However, simply asserting that moving party's amended petition is frivolous does not force the court to accept the assertion as true. . . . [¶] Additionally responding party's frivolous conclusion has been repeatedly denied by this court twice and by the court of appeals as confirmed by judicially noticeable facts."

On July 18, 2011, the probate court ruled: "After further review, the Court adopts its tentative ruling as articulated on the record on June 27, 2011 as its ruling. Stephan M. Sperling's motion for judgment on the pleadings with regards to Wendy Norma Courtney's Petition for Instructions filed November 10, 2010 is granted." On August 24, 2011, the probate court entered an order denying the petition for instructions regarding enforcement of the no contest clause. On October 11, 2011, the trustee filed a timely notice of appeal.

III. DISCUSSION

A. Standard of Review

A motion for judgment on the pleadings has the same purpose and effect as a general demurrer. (*Smiley v. Citibank* (1995) 11 Cal.4th 138, 146; *Ludgate Ins. Co. v.*

Lockheed Martin Corp. (2000) 82 Cal.App.4th 592, 602.) We accept as true and liberally construe all material facts alleged in the complaint. However, we also consider matters subject to judicial notice. (*Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal.4th 468, 515; *Bezirdjian v. O'Reilly* (2010) 183 Cal.App.4th 316, 321.) We independently review the trial court's granting of judgment on the pleadings. (*Gerawan Farming Inc. v. Lyons, supra*, 24 Cal.4th at pp. 515-516; *Smiley v. Citibank, supra*, 11 Cal.4th at p. 146.)

B. The First Amended Petition Does Not Violate No Contest Provision

The interpretation of a trust instrument is a question of law subject to independent review where there is no conflict or question of credibility in the extrinsic evidence. (*Johnson v. Greenelsh* (2009) 47 Cal.4th 598, 604; *Burch v. George* (1994) 7 Cal.4th 246, 254.) Our Supreme Court summarized the principles guiding the courts' interpretation of no contest clauses in *Johnson v. Greenelsh, supra*, 47 Cal.4th at page 604: "Although no contest clauses are enforceable and favored by the public policies of discouraging litigation and preserving the transferor's intent, they are nevertheless strictly construed and may not be extended beyond their plainly intended function. [Citations.] "Whether there has been a 'contest' within the meaning of a particular no-contest clause depends upon the circumstances of the particular case and the language used." [Citations.]" (*Johnson v. Greenelsh, supra*, 47 Cal.4th at p. 604 quoting *Burch v. George, supra*, 7 Cal.4th at pp. 254-255.)

The trustee argues the trial court erred in granting Stephan's judgment on the pleadings motion. We conclude the trial court properly granted judgment on the pleadings on the trustee's petition for instructions. The no contest clause of the trust instrument provides: "If any beneficiary under this instrument or any trust hereunder, other than a Settlor or any charitable beneficiary, in any manner directly or indirectly, contests or attacks this instrument or any provision under this instrument, or the Will of a Settlor or any provision under that Will, or conspires to do so, or fails to cooperate in good faith in the defense of any attack or contest, any share or interest in this trust estate

given to or for the benefit of such beneficiary under this instrument is revoked and shall be disposed of in the same manner provided herein as if such beneficiary had predeceased the Settlers without issue.” Here, neither the original removal petition nor the first amended petition attacks the trust instrument or any of its provisions.

As to the original removal petition, we held it did not violate the no contest clause in our prior unpublished decision: “The proposed petition to remove the trustee does not contest or attack the trust instrument or any of its provisions. Success on the proposed petition would not change the Sperlings’ estate plan or disturb any trust terms. . . . The proposed petition addresses the trustee’s conduct. It seeks to remove and replace the trustee for alleged acts in breach of her fiduciary duties – specifically: occupying the trust real property without paying rent; investing in speculative internet investments; and failing to fund the qualified trust. Nothing in the language of the no contest clause prevents Stephan from asserting the trustee has breached her fiduciary duties.” (*Sperling v. Courtney*, *supra*, at pp. 12-13.) The original removal petition on its face is not frivolous. Our holding in this regard is controlled by the law of the case doctrine. (*Morohoshi v. Pacific Home* (2004) 34 Cal.4th 482, 491; *People v. Stanley* (1995) 10 Cal.4th 764, 786.)

In addition, the first amended petition on its face does not violate the no contest clause. The first amended petition alleges the trustee breached her fiduciary duties by: failing to fund the qualified trust; investing in a non-publicly traded limited liability company she has a personal interest in; and refusing to disclose the terms of her children’s purchase of the trust’s interest in the limited liability company. Nothing in the language of the no contest clause prevents Stephan from asserting a fiduciary breach duty based on these new allegations of misconduct by the trustee. Further, on its face, Stephan’s first amended petition is not frivolous. Finally, granting Stephan’s judgment on the pleadings motion on the petition for instructions does not deprive the trustee of “her day in court” as she asserts. Nothing prevents the trustee from introducing extrinsic evidence to challenge the merits of the two petitions.

IV. DISPOSITION

The August 24, 2011 order is affirmed. Stephan Michael Sperling is to recover his appeal costs from Wendy Norma Courtney, as trustee of the Samuel J. and Beatrice Sperling Family Trust.

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TURNER, P. J.

We concur:

ARMSTRONG, J.

MOSK, J.